

02 NOV -1 AM 9:24

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION AGENCY
REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Best Pest Control Company
2320 Henton Road
Manhattan, Kansas 66502

Respondent

) Docket No. FIFRA-07-2003-0012
)
) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
)
)
)

COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region VII.
4. The Respondent is Best Pest Control Company, a pesticide applicator, located at 2320 Henton Road, Manhattan, Kansas. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

Section III

Violation

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:

6. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

7. On or about May 8, 2001, Respondent's employee, Paul Ehrlich, while acting within the scope of his employment, applied a tank mix of Microflo Company BANVEL herbicide (EPA Registration No. 51036-289) and Monsanto Company ROUNDUP PRO herbicide (EPA Registration No. 524-475) to vegetation surrounding small trees on the Fort Riley Military Reservation.

8. At the time of the referenced application, Paul Ehrlich, applicator was certified as a Kansas commercial applicator under license number 2325 in categories 2, 3, 5, 6, & 7.

9. On or about May 8, 2001, representatives of the Kansas Department of Agriculture (KDA) conducted a routine use investigation of the above application and collected records, photographs, and samples pertaining to this application. The KDA inspectors stated in their inspection report that they observed Paul Ehrlich apply the tank mix of herbicides set forth in paragraph 7.

10. On or about May 8, 2001, representatives of the KDA observed and documented Paul Ehrlich wearing a short-sleeved shirt, brown cotton gloves, and no protective eyewear during the application of products set forth in paragraph 7.

11. The label of Microflo BANVEL herbicide (EPA Registration No. 51036-289), states, in pertinent part: "Applicators and other handlers must wear: - Long-sleeved shirt and long pants - Waterproof gloves - Shoes plus socks - Protective eyewear."

12. The label of Monsanto ROUNDUP PRO herbicide (EPA Registration No. 524-475), states, in pertinent part: "Applicators and other handlers must wear: long-sleeved shirt and long pants, shoes plus socks."

13. The label of Microflo BANVEL herbicide (EPA Registration No. 51036-289), states, in pertinent part: "BANVEL may cause injury to desirable trees and plants, particularly beans, cotton, flowers, fruit trees, grapes, ornamental, peas, potatoes, soybeans, sunflowers, tobacco, tomatoes and other broadleaf plants when contacting their roots, stems or foliage. These plants are most sensitive to BANVEL during their development or growing stage. FOLLOW THE PRECAUTIONS LISTED BELOW WHEN USING BANVEL.

- Do not treat areas where either possible downward movement into the soil or surface washing may cause contact of BANVEL with the roots of desirable plants such as trees and shrubs."

14. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using a registered pesticide inconsistent with label directions.

15. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 6 through 14, it is proposed that a civil penalty of \$4,400 be assessed against the Respondent.

Section IV

Total Proposed Penalty

16. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty of up to Five Thousand Five Hundred Dollars (\$5,500) for each violation. The EPA proposes to assess a total civil penalty of \$4,400 against Respondent for the above-described violation.

Appropriateness of Proposed Penalty

17. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

18. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were \$676,038 per year. This information placed Respondent in Category II size of business, as set forth in the FIFRA Civil Penalty Calculation Worksheet attached hereto and incorporated herein by reference (See Enclosure). If EPA's estimate of Respondent's total business revenues is incorrect, Respondent may submit reliable financial documentation indicating another category is appropriate.

19. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

20. The proposed penalty constitutes a demand only if Respondent fails to raise bona fide issues of ability to pay, or other bona fide affirmative defenses relevant to the determination of any final penalty.

21. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought to the attention of Complainant at the earliest opportunity in this proceeding.

22. Payment of the total penalty - \$ 4,400 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

23. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and a copy to:

Henry F. Rompage
Assistant Regional Counsel
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

NOTICE OF OPPORTUNITY FOR HEARING

Section V

Answer and Request for Hearing

24. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that

Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- a. The circumstances or arguments that are alleged to constitute the grounds of defense;
- b. The facts that Respondent intends to place at issue; and
- c. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

25. Any hearing that is requested shall be held and conducted in accordance with the "Consolidated Rules of Practices Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (copy enclosed).

26. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

27. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

Section VI

Settlement Conference

28. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

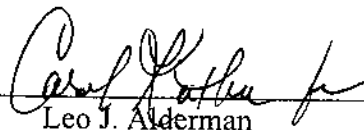
Henry F. Rompage
Assistant Regional Counsel
EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: (913) 551-7280

29. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

30. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

OCT 31 2002

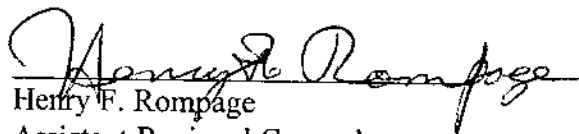
Date



Leo J. Alderman

Director

Water, Wetlands, and Pesticides Division



Henry F. Rompage

Assistant Regional Counsel

Office of Regional Counsel

Enclosures:

1. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
2. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
3. FIFRA Civil Penalty Calculation Worksheet
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants Duty to Disclose Environmental Legal Proceedings

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Ruth A. Rheume
Owner of Best Pest Control Company
2320 Henton Road
Manhattan, Kansas 66502

11/01/2002
Date

Vitula Lungren
Vitula Lungren

FIFRA CIVIL PENALTY CALCULATION WORKSHEET
ENFORCEMENT RESPONSE POLICY for FIFRA - References

RESPONDENT: Best Pest Control Company
 ADDRESS: 2320 Henton Road
 Manhattan, Kansas 66502

Prepared By: Mark K. Leshner
 Date: 10/22/02
 Case File: 050801F402401

	Count 1	Count 2	Count 3	Count 4
Appendix A				
1. Statutory Violation	§ 12(a)(2)(G)			
2. FTTS Code	2GA			
3. Violation Level	2			
Appendix C - Table 2 - Size of Business Category				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§ 14(a)(1)			
5. Size of Business Category	II			
Appendix C - Table 1 - FIFRA Civil Penalty Matrix				
6. BASE PENALTY	\$4,400			
Appendix B - Gravity Adjustments				
7a. Pesticide Toxicity	1			
7b. Human Harm	3			
7c. Environmental Harm	3			
7d. Compliance History	0			
7e. Culpability	2			
7f. Total Gravity Adjustment Value (add items 7a - 7e)	9			
Appendix C - Table 3 - Adjustments				
7g. Percent Adjustment	--			
7h. Dollar Adjustment	--			
8. Final Penalty** (item 7h from item 6)	\$4,400			
Combined Total Penalty (total of all columns for line 8, above)	\$4,400			

* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

**The final penalty in each column of line 8 cannot exceed the statutory maximum.